Supreme Court, U.S.
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No. 01-695

In the Supreme Court of the United States

IRWIN MORTGAGE CORPORATION,
PETITIONER,

v.

JOHN ROBERT CULPEPPER, PATRICIA STARNES CULPEPPER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, AND BEATRICE N. HIERS, INDIVIDUALLY AND AS A REPRESENTATIVE OF A CLASS OF SIMILARLY SITUATED INDIVIDUALS,
RESPONDENTS.

REPLY BRIEF FOR PETITIONERS

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Respondents' attempts to avoid the import of HUD's rejection of the decision of the Court of Appeals below in no way undermines the compelling case Petitioner has presented for the exercise of this Court's power to grant, vacate and remand. The Court of Appeals squarely decided that HUD's 1999 Policy Statement[1] established the governing test for liability for the payment of yield spread premiums under RESPA, 12 U.S.C. § 2607, but that HUD's test was ambiguous. The Court of Appeals resolved that ambiguity one way. HUD has now rejected the Eleventh Circuit's interpretation and resolved the same ambiguity in precisely the opposite way.[2]

There is no legal or prudential basis for Respondents' assertion that this Court should deny relief so that the pure questions of law at issue here could be litigated (again) in the District Court. The Court of Appeals, in granting Petitioner's Rule 23(f) petition, already decided that the resolution of the legal issues presented here should not be postponed until an ultimate decision on the merits. None of Respondents' arguments alter that calculus, and Respondents do not even contend that they will suffer prejudice from a remand to the Court of Appeals. Indeed, a remand is particularly compelling given that the Eleventh Circuit is currently considering the very same issues in three companion cases.

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[1] Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers; Final Rule, 64 Fed. Reg. 10,080 (Mar. 1, 1999) (Pet. App. 77a) ("1999 Policy Statement").

[2] Real Estate Settlement Procedures Act (RESPA) Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b); Final Rule, 66 Fed. Reg. 53,052 (Oct. 18, 2001) (Pet. App. 107a) ("2001 Policy Statement")

Finally, the lengths that Respondents go to undermine the validity and authoritative strength of HUD's 2001 Policy Statement are largely beside the point. While the Policy Statement is entitled to the highest level of deference, this Court made clear in *Lawrence v. Chater*, 516 U.S. 163 (1996) (per curiam), that such issues should be addressed in the first instance by Courts of Appeals. Whether HUD's statement is binding under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and *Auer v. Robbins*, 519 U.S. 452 (1997), as Petitioner maintains, or is merely entitled to great deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the grounds for granting, vacating and remanding the Petition remain strong.[3]

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[3] Respondents challenge a number of the factual assertions outlined in the Petition, primarily with respect to the details of Respondents' loan closings. Brief in Opposition at 12-15. Petitioner strongly disagrees with Respondents' characterization of the facts, and the record supports all of Petitioner's assertions. Moreover, the courts below have made no findings of fact, as this case was appealed on the class certification issue and Respondents' motion for summary judgment is still pending before the District Court. Such attacks, however, are entirely irrelevant to the issues before this Court. The only question before the Court of Appeals was the propriety of class certification, an issue the Court decided based on what it determined to be the legal standard for liability under RESPA. The heart of the Court of Appeals' conclusion was the proposition that class certification was appropriate under the 1999 Policy Statement's test because the individual facts of any given transaction did not matter. The fact that Respondents argue so vigorously over fractions of percentages of commissions paid in the named plaintiffs' transactions merely underscores the importance of taking each transaction on a case-by-case basis rather than approaching Petitioner's liability on a class-wide basis.

ARGUMENT

I. THE PROCEDURAL POSTURE OF THIS CASE MAKES THE EXERCISE OF THIS COURT'S AUTHORITY TO GRANT, VACATE AND REMAND MORE, NOT LESS, COMPELLING.

1. There can be no dispute that the 2001 Policy Statement represents a significant intervening development. Respondents' principal argument against remanding this case to the Court of Appeals for reconsideration instead turns on their mistaken view that the interlocutory nature of the appeal warrants deference to the District Court in the first instance, both because the Court of Appeals ultimately will have an opportunity to hear Petitioner's arguments and because other grounds might render moot the issues decided by the Court of Appeals. Brief in Opposition at 18-21. In fact, the opposite is true.

To begin with, contrary to Respondents' blanket assertion, this Court regularly GVRs interlocutory appeals. *See, e.g., Household Int'l Tax Reduction Inv. Plan v. Matz*,— U.S. —, 121 S. Ct. 2545 (2001) (interlocutory appeal; granted, vacated, and remanded in light of *United States v. Mead*, 533 U.S. 218 (2001)); *Illinois St. Univ. v. Varner*, 528 U.S. 1110 (2000) (interlocutory appeal; granted, vacated, and remanded in light of *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000)). Nor is there a basis to draw a distinction between final and interlocutory decisions in this regard: by their very nature, appeals that have been certified for interlocutory review involve a narrow category of issues that warrant appellate review prior to the conclusion of the litigation in the District Court, *see, e.g.*, 28 U.S.C. §1292(b).

This case reached the Court of Appeals under Federal Rule of Civil Procedure 23(f), which grants appellate courts

discretionary authority to allow interlocutory appeals when, among other considerations, "as a practical matter, the decision on certification is likely dispositive of the litigation." Advisory Committee Notes to Rule 23(f). The Advisory Committee has likened the decision on a Rule 23(f) motion "to the discretion exercised by the Supreme Court in acting on a petition for certiorari." *Id.* Thus the fact that the Court of Appeals granted Petitioner's Rule 23(f) motion reflects the considered judgment of that Court that the issue of certification should not wait until final resolution, and Respondents offer no arguments as to why the Court of Appeals' judgment on that point should be relitigated now.

Moreover, the fact that the Court of Appeals will have the opportunity to revisit the fundamental question of the standard of liability under RESPA (and thus the propriety of class certification under that standard) argues strongly in favor of having such dispositive issues resolved now rather than at the end of protracted litigation in the District Court. Respondents clearly will not be prejudiced by an immediate return to the Court of Appeals, given their acknowledgment that the Court of Appeals will be the ultimate arbiter (short of a resolution by this Court) of the legal decisions made in the course of this litigation. All of the parties to this case have a strong interest in avoiding needless litigation, and any further proceedings in the District Court following the decision of the Court of Appeals on remand from this Court would be free from the pall of doubt that HUD's 2001 Policy Statement has now cast on the case below.[4]

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[4] It is surprising to say the least that Respondents argue that the legal questions at issue in this case would benefit from further development of the record in the District Court. Brief in Opposition at 18-19. Respondents have consistently maintained, in an argument the Court of Appeals below essentially adopted wholesale, *see* n. 3, *supra*, that none of the factual matters potentially worthy of development with respect to

As Respondents acknowledge, the Eleventh Circuit has asked for briefing on the very issues pending in the Petition, *see* Brief in Opposition at 19 n.6; *see also* Pet. App. 140a-45a. It makes no sense to have the Eleventh Circuit resolve the issues raised in the Petition in three companion cases without also doing so at the same time in the one case in which the Court of Appeals has already ruled. For all of these reasons, it is critical for the efficient and fair resolution of this litigation to return the case to the Court of Appeals immediately.[5]

2. Despite Respondents' assertion to the contrary, most of the issues Respondents raise as potentially mooting the questions presented in the Petition are not before the District Court, even though, as Respondents point out, there has been full briefing on both the merits and the supplemental issues raised by the 2001 Policy Statement. *See* Brief in Opposition at 18. Specifically, neither the question whether applying the HUD 2001 Policy Statement to such an on-going case would render its application retroactive nor the alternative class definitions Respondents now posit have been raised or argued on remand from the decision below and are thus not before the District Court.

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individual loan transactions have relevance to their basic theory of liability—namely that because Petitioner pays yield spread premiums based on terms and conditions common to all loans, such payments are categorically illegal under RESPA.

[5] Petitioner has moved for a stay of the District Court proceedings pending resolution of the Court of Appeals' consideration of the impact of HUD's 2001 Policy Statement in the three companion cases to the case below. In at least one district court case in the Eleventh Circuit a stay (by stipulation) has been granted in recognition of the importance of having the Court of Appeals resolve the fundamental issues called into doubt by the 2001 Policy Statement. *Beggs v. Irwin Mortgage Corp.*, Stipulation and Order for Stay of Proceedings, Case No. CV-01-HGD-2205-E (N.D. Ala. Dec. 6, 2001).

With respect to the law-of-the-case doctrine, which Respondents did raise before the District Court, there is nothing to be gained from resorting to the District Court in the first instance. Both parties agree that the issue will not be settled until the Court of Appeals addresses it. Any decision by the District Court on law-of-the-case grounds certainly would in no way moot the question pending before this Court.

3. Respondents' third argument against remanding to the Court of Appeals now—the contention that the Court of Appeals has fully considered and "repeatedly rejected" the standard clarified in the 2001 Policy Statement—is fundamentally wrong.[6] Despite Respondents' selective quotations from the decision below, what the Court of Appeals actually decided was that the test set forth in the 1999 Policy Statement controls the analysis of liability for the payment of yield spread premiums under RESPA, Pet. App. 5a; that the test is "imbue[d] with the force of law," *id.*; that the 1999 Policy Statement "is ambiguous," *id.* 6a; and that, in the Court's view, Respondents' resolution of that ambiguity had greater merit, *id.* 8a-13a. In this final judgment the Court of Appeals erred, as the 2001 Policy Statement has now made clear, but the critical point is that the Court never ruled that the HUD test does not control

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[6] Respondents are trying to have it both ways with respect to whether the Court of Appeals has considered the 2001 Policy Statement. Contrary to what Respondents have argued before this Court, in the District Court respondents argued that the 2001 Policy Statement "clearly articulates a new standard" of liability, that it is "HUD's new interpretation" of the 1999 Policy Statement, and that the 2001 Policy Statement "is inconsistent with [HUD's] prior formal . . . pronouncement[ ] [in the 1999 Policy Statement]." Plaintiff's Response to Oct. 31, 2001 Court Order at 5, 8, 17.

nor that the language of RESPA requires (as opposed to recommends) any specific interpretation of that test.[7]

Had the Court of Appeals felt that RESPA mandated a given rule of liability, there would have been no reason to grapple with the ambiguity the Court found in the 1999 Policy Statement, because, as this Court has made clear on numerous occasions, if Congress has spoken to a given issue, that settles the question. *See, e.g., NationsBank of N.C. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995) (stating that if "'the intent of Congress is clear . . . that is the end of the matter.'" (quoting *Chevron*, 467 U.S. at 842)). Equally telling is the fact that the Court of Appeals has asked for briefing on the impact of the 2001 Policy Statement, indicating that the Court does not consider the issues raised by that Policy Statement resolved. In short, the only question the Court of Appeals actually decided below was which of two reasonable interpretations of the standard for liability under RESPA HUD had chosen, and HUD has now spoken to the contrary.

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[7] The instances in which the Court of Appeals adverted to the language of the statute were not considered judgments about what RESPA requires, but rather applications of an interpretative tool analogous to the way courts interpret ambiguous statutes so as to avoid raising constitutional questions while carefully declining to rule on the constitutional provisions themselves. *See, e.g., De Bartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988). Thus, for example, the Court of Appeals indicated that Section 8(c) "implies" a direct link between specific services and any given element of total compensation, that everything about 8(c) "suggests" that it is a gloss on 8(a), and that "[i]f" that is so, "we should avoid reading" the provision in line with an interpretation of the HUD test that would create a perceived internal tension in Section 8. Pet. App. 10a-11a. Petitioner disagrees with this interpretation, but regardless of the merits, it is clear that the Court of Appeals did not treat the statutory question as squarely presented.

II. STRONG GROUNDS EXIST FOR GIVING HUD'S INTERPRETATION BINDING DEFERENCE AND THIS ISSUE DOES NOT UNDERMINE THE IMPORTANCE OF RECONSIDERATION BELOW.

Respondents argue that a GVR is not appropriate because the 2001 Policy Statement is not entitled to binding deference. As Petitioner has noted, however, this argument is largely beside the point. This Court has held that an intervening agency interpretation may be the basis of a GVR order if that agency interpretation "is reasonably probably entitled to deference." *Lawrence*, 516 U.S., 172. Indeed, in *Lawrence*, the Court GVR'd in light of a change in interpretation announced in a litigation brief. *Id.* at 165. Thus there is no need for this Court to determine whether the 2001 Policy Statement is due binding *Chevron* deference or merely persuasive *Skidmore* deference in order to GVR.

None of the arguments Respondents put forward, however, call into serious question the proposition that the HUD test, articulated in the 1999 Policy Statement and clarified in the 2001 Policy Statement, is entitled to the highest deference. *Christiansen v. Harris County*, 529 U.S. 576 (2000), involved an informal opinion letter that lacked the force of law. In sharp contrast, the 2001 Policy Statement was issued pursuant to an explicit grant of authority by Congress to issue binding interpretations of RESPA, *see* 12 U.S.C. § 2617(a), and was published by HUD in the Federal Register, as prescribed by RESPA and the Administrative Procedures Act, 5 U.S.C. § 552. This Court only last Term reaffirmed, moreover, that notice-and-comment rulemaking and formal adjudication are not the sole categories of administrative action entitled to *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 306 (2001) (citing *NationsBank*, 513 U.S. at 256-57).

Respondents also ignore entirely the proposition that to the degree the 2001 Policy Statement is a clarification of the 1999 Policy Statement it is "controlling" unless "plainly erroneous or inconsistent" with the earlier interpretation. *Auer*, 519 U.S. at 461. Respondents do not challenge the Court of Appeal's conclusion that the 1999 Policy Statement is binding and an important rationale for the kind of deference reaffirmed in *Auer*—that the entity most qualified to clarify an ambiguity in an administrative pronouncement is the entity that promulgated it—applies fully in this case.

Finally, Respondents' arguments with respect to Section 8(c)(5) of RESPA simply have nothing to do with this case. HUD itself made clear in unmistakable terms that both the 1999 and 2001 Policy Statements were promulgated under the general grant of authority to implement RESPA found in Section 19(a) of RESPA.[8] *See* Pet. App. 92a, 109a. Section 8(c)(5) of RESPA is not, as Respondents claim, a distinct source of authority to interpret and implement RESPA. It is, rather, specific authority to create categories

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[8] There can be no doubt that Congress in this provision clearly delegated to HUD broad authority to implement RESPA. Section 19(a) of RESPA provides that "[t]he Secretary [of HUD] is authorized to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of this Act." 12 U.S.C. § 2617(a) This delegation language is indistinguishable from that found in any number of statutory regimes this Court has found to indicate Congressional intent to grant broad implementing authority. *See, e.g., AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 (1999) (citing 47 U.S.C. § 201(b)'s grant of authority to the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 n.15 (1996) (citing 21 U.S.C. § 371(a)'s grant of authority to the FDA "to promulgate regulations for the efficient enforcement of this Act").

of exempt payments beyond those specified in Section 8(c).[9] The canon of construction that the more specific statutory provision controls only applies where both provisions cover the same subject. The authority to create additional exceptions from Section 8 liability provided in Section 8(c)(*5*), however, in no way clashes with HUD's authority to act pursuant to Section 19(a) to fill in gaps left by Congress in the application of the exception from liability already set forth in Section 8(c)(*2*).

CONCLUSION

The standard this Court set forth in *Lawrence* has been met in all respects and Petitioner thus urges the Court to grant the petition, vacate the decision of the Court of Appeals, and remand for reconsideration. In the alternative, for the reasons set forth in the Petition—which Respondents generally have not addressed—the Court should grant plenary review.

Respectfully submitted,

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[9] Section 8(c) of RESPA identifies four categories of payments exempt from the prohibitions found Section 8(a) and 8(b), 12 U.S.C. §2607(c), including that at issue in this case. The Act, in Section 8(c)(5), then grants authority to HUD to specify "such other payments or classes of payments or other transfers" that are exempt from Section 8 liability, but HUD may exercise this authority only by regulation and after consultation with several other agencies and departments. *See id.* § 2607(c)(5).